

NOTION FILED
NOV 24 1978

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

78-17

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

BILLY J. McCOMBS, *et al.*,
Respondents,

78-249

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

BILLY J. McCOMBS, *et al.*,
Respondents.

On a Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
ON BEHALF OF ASSOCIATED GAS DISTRIBUTORS
AND BRIEF AMICUS CURIAE

FREDERICK MORING
DANA CONTRATTO

Counsel for *Amicus Curiae*

Of Counsel:

JONES, DAY, REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

November 24, 1978

**ASSOCIATED GAS DISTRIBUTORS
Company Members**

Baltimore Gas and Electric Co.
Bay State Gas Co.
The Berkshire Gas Co.
Boston Gas Co.
Bristol & Warren Gas Co.
The Brooklyn Union Gas Co.
Cape Cod Gas Co.
Central Hudson Gas & Electric Corp.
Chesapeake Utilities Corp.
City of Holyoke, Mass., Gas & Electric Dept.
City of Westfield Gas & Electric Light Dept.
Commonwealth Gas Co.
Concord Natural Gas Corp.
The Connecticut Gas Co.
Consolidated Edison Company of New York, Inc.
Delmarva Power & Light Co.
Fall River Gas Co.
Fitchburg Gas & Electric Light Co.
Gas Service, Inc.
The Hartford Electric Light Co.
Haverhill Gas Co.
Long Island Lighting Co.
Lowell Gas Co.
Lynchburg Gas Co.
Manchester Gas Co.
New Bedford Gas & Edison Light Co.
New Jersey Natural Gas Co.
New York State Electric & Gas Corp.
Northern Utilities, Inc.
The Pequot Gas Co.
Philadelphia Electric Co.
Philadelphia Gas Works
Providence Gas Co.
Public Service Company of North Carolina, Inc.
Public Service Electric & Gas Co.
Rochester Gas & Electric Corp.
South County Gas Co.
South Jersey Gas Co.
The Southern Connecticut Gas Co.
Tiverton Gas Co.
UGI Corporation
Valley Gas Co.
Washington Gas Light Co.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

78-17

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

BILLY J. McCOMBS, *et al.*,
Respondents,

78-249

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

BILLY J. McCOMBS, *et al.*,
Respondents.

On a Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

**MOTION FOR LEAVE TO FILE
BRIEF AS AMICUS CURIAE**

Associated Gas Distributors (AGD)¹ hereby
respectfully moves pursuant to Rule 42(3) for leave to

¹The AGD member companies are listed on the inside cover of
this motion and brief.

file the attached brief as *amicus curiae* in these cases. The consent of counsel for petitioners has been obtained, but counsel for respondents has objected.

I.

STATEMENT OF INTEREST

Associated Gas Distributors is an unincorporated association of gas distribution companies serving over 11 million customers along the Eastern Seaboard or approximately 25 percent of the Nation's interstate natural gas customers. AGD member companies rely almost exclusively on interstate pipeline companies for pipeline gas supplies. As the principal pipelines supplying gas to the East Coast have sharply curtailed deliveries, beginning about 1970, AGD member companies have experienced increasing difficulty in providing adequate and reliable service to their customers, as required by various state laws governing utilities.

Since AGD companies depend heavily on gas supplies available to the interstate market, they are deeply concerned that the decision of the Court of Appeals will result in the loss of substantial volumes of flowing supplies through unauthorized abandonments. Accordingly, AGD member companies may be adversely and directly affected by the outcome of the present case.

II.

REASONS FOR GRANTING THE MOTION

On its face, the decision of the Court of Appeals applies to the disposition of natural gas production from only one lease in Karnes County, Texas—the Butler B lease. The decision held that, notwithstanding the explicit terms of Section 7(b) of the Natural Gas Act, service could be legally abandoned without approval of the Federal Energy Regulatory Commission. The principle adopted by the Court of Appeals, if affirmed, will have serious and far-reaching implications for the stability and security of interstate gas supplies. Over the last ten years, the percentage of new gas discoveries dedicated to the interstate market has dropped precipitously, making the security of flowing supplies all the more crucial to adequate interstate service. Yet the decision of the Court of Appeals would allow abandonment of potentially very significant volumes of production completely free from Commission scrutiny under Section 7(b) of the Natural Gas Act.

The petitioners have consented to AGD's filing of a brief *amicus curiae*. Although the FERC may be expected to advance generally the interests of natural gas purchasers, it does not specifically represent the East Coast purchasers that have been affected most deeply by continuing curtailment of natural gas deliveries.

The Court must look beyond the narrow question, as defined by respondents, to the issues of security and stability of present and future interstate natural gas supplies and the integrity of federal jurisdiction under the Natural Gas Act.

III. CONCLUSION

Accordingly, and for the above reasons, Associated Gas Distributors respectfully urges the Court to grant the present motion so that AGD may present its views in the attached brief.

Respectfully submitted,

FREDERICK MORING
DANA CONTRATTO

Attorneys for *Amicus Curiae*

Of Counsel:

Jones, Day, Reavis & Pogue
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-5800

November 24, 1978

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

78-17

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

BILLY J. McCOMBS, *et al.*,

Respondents,

78-249

FEDERAL ENERGY REGULATORY COMMISSION,

Petitioner,

v.

BILLY J. McCOMBS, *et al.*,

Respondents.

On a Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF
ASSOCIATED GAS DISTRIBUTORS
IN SUPPORT OF PETITIONERS

FREDERICK MORING
DANA CONTRATTO

Counsel for *Amicus Curiae*

Of Counsel:

JONES, DAY, REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

November 24, 1978

INDEX

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	2
ARGUMENT	3
I. The Decision of the Court of Appeals Nullifies The Requirement That Natural Gas Service In Interstate Commerce May Not Be Abandoned Without Prior Approval Of The Federal Energy Regulatory Commission	3
II. If Allowed To Stand, The Decision Of The Court Of Appeals Will Have Adverse Implications For Interstate Consumers Beyond The Facts Of This Case	7
CONCLUSION	9
CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

Page

CASES:

<i>Atlantic Refining Co. v. Public Service Comm'n</i> New York, 360 U.S. 378 (1959)	5
<i>California v. Southland Royalty Co.</i> , 436 U.S. _____, 98 S. Ct. 1955 (1978)	4, 5
<i>McCombs v. Federal Energy Regulatory Comm'n</i> , 570 F.2d 1376 (10th Cir. 1978)	<i>passim</i>
<i>Sunray Mid-Continent Oil co. v. Federal Power Comm'n</i> , 364 U.S. 137	5
<i>Texaco Inc., et al.</i> , Docket No. G-8820, Order Granting Petition for Reconsideration and Modifying Prior Order (FERC, Nov. 1, 1977)	6

STATUTES:

Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. §717 <i>et seq.</i>	<i>passim</i>
Section 7(b), 15 U.S.C. §717f(b)	<i>passim</i>
Section 7(c), 15 U.S.C. §717f(c)	7
Natural Gas Policy Act of 1978, Pub. L. 95—____, Title III and Title VI	8, 9

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

78—17

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

BILLY J. McCOMBS, *et al.*,*Respondents,*

78—249

FEDERAL ENERGY REGULATORY COMMISSION,

Petitioner,

v.

BILLY J. McCOMBS, *et al.*,*Respondents.*

On a Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF
ASSOCIATED GAS DISTRIBUTORS
IN SUPPORT OF PETITIONERS

QUESTION PRESENTED

Whether abandonment of certificated natural gas
service may be legally accomplished by judicial

decree without the permission and approval of the Federal Energy Regulatory Commission pursuant to Section 7(b) of the Natural Gas Act.

INTEREST OF AMICUS CURIAE

Associated Gas Distributors (AGD) is an unincorporated association of gas distribution companies serving over 11 million customers along the Eastern Seaboard, or approximately 25 percent of the nation's interstate natural gas customers. AGD member companies rely almost exclusively on interstate pipeline companies for gas supplies. As the principal pipelines supplying gas to the East Coast have sharply curtailed deliveries, beginning about 1970, AGD member companies have experienced increasing difficulty in providing adequate and reliable service to their customers, as required by various state laws governing utilities.

Since AGD companies depend heavily on gas supplies available to the interstate market, they are deeply concerned that the decision of the Court of Appeals will result in substantial volumes of interstate flowing supplies being abandoned and may seriously disrupt the stability of interstate dedications of natural gas in the future. AGD member companies will be adversely and directly affected if the decision of the Court of Appeals is upheld. Accordingly, AGD submits the present brief *amicus curiae* in support of petitioners.

ARGUMENT

I. The Decision Of The Court Of Appeals Nullifies The Requirement That Natural Gas Service In Interstate Commerce May Not Be Abandoned Without Prior Approval Of The Federal Energy Regulatory Commission.

In this case, the Court of Appeals ruled that abandonment of gas service was accomplished

as a matter of law, when all of the parties recognized that the then known natural gas reserves were depleted in 1966 followed by failure to provide any service under the certificates for a period of five years during which time there was no evidence of other estimated gas reserves recoverable from the subject leaseholds.

McCombs v. Federal Energy Regulatory Commission, 570 F.2d 1376, 1382 (10th Cir. 1978). This conclusion is directly contrary to the explicit requirements of Section 7(b) of the Natural Gas Act, opinions of this Court and opinions and orders of the Federal Energy Regulatory Commission (the Commission).

Section 7(b) of the Natural Gas Act clearly states the threshold requirements necessary for gas service to be abandoned:

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission,

or any service rendered by means of such facilities, *without the permission and approval of the Commission first had and obtained*, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

52 Stat. 824, 15 U.S.C. § 717f(b) (emphasis added). The language of §7(b) and Congressional intent expressed by it could not be more unequivocal. Commission "permission and approval" is simply a statutory prerequisite to abandonment of gas service. The statute leaves no room for the courts of appeals to fashion equitable remedies of *de jure* abandonment akin to common law notions of adverse possession. The Act establishes responsibility for gas service regulation including abandonment of such service in the Commission, not the courts of appeals. Indeed, the Act's comprehensive scope of federal licensing and its consumer supply protection purposes seriously undermine and belie any contrary interpretation.

As recently as last Term, the Court had occasion to address the requirements of Section 7(b). In *California v. Southland Royalty Co.*, 436 U.S. —, 98 S. Ct. 1955 (1978), the Court summarized this obligation as follows:

Once the gas commenced to flow into interstate commerce from the facilities used by the lessees, § 7(b) required that the Commission's permission be obtained prior to the discontinuance of "any service rendered by means of such facilities." Private

contractual arrangements might shift control of the facilities and thereby determine *who* is obligated to provide that service, but the parties may not simply agree to terminate the service obligation without the Commission's permission.

436 U.S. at —, 98 S. Ct. at 1960. The *Southland* decision was in large part premised upon *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137 (1960) where the Court noted:

It might be observed that in these cases the Commission issued certificates without time limitations. Thus if the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b). The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants.

364 U.S. at 158 n.25. See also, *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 389 (1959). The decision below cannot be squared with these cases which properly call for the *Commission's*, not a court of appeals', determination in the first instance as to whether sufficient grounds exist to warrant approval of abandonment of service.

Respondents and the court below have made much of the parties' recognition

that the then known natural gas reserves were depleted in 1966 followed by failure to provide

any service under the certificates for a period of five years during which time there was no evidence of other estimated gas reserves recoverable from the subject leaseholds.

570 F.2d at 1382. Whatever may have been the parties' perception of the geological facts, it does not follow that the Commission would have accepted that view and granted abandonment without further ado. To make the latter assumption is to assume the absence of meaningful administrative procedures required by Section 7(b). This assumption seems particularly strained in light of the now obvious fact that the gas reserves were *not* depleted. By its reliance on what the parties "recognized," the Court of Appeals completely precludes the Commission from exercising its statutory responsibilities to test the reality of that perception. Had the §7(b) abandonment procedures been engaged, Respondents would have had to *prove* their case. In such circumstances, additional facts could well have arisen causing the Commission not to grant abandonment. See, e.g., *Texaco Inc., et al.*, Docket No. G-8820, Order Granting Petition for Reconsideration and Modifying Prior Order (FERC, Nov. 1, 1977).

The Court of Appeals, however, has bypassed the Commission's authority and usurped it to itself. That decision effectively nullifies the Section 7(b) requirement of *Commission* approval prior to abandonment and substitutes administration by judicial supposition.

II. If Allowed To Stand, The Decision Of The Court Of Appeals Will Have Adverse Implications For Interstate Consumers Beyond The Facts Of This Case.

Strict compliance with Section 7(b) abandonment procedures is a crucial element in the institutional framework of the natural gas industry. At issue is nothing less than the Commission's ability to assure stable and reliable supplies of natural gas for the interstate market. It can hardly be gainsaid that natural gas pipelines, distributors, their lenders and their customers place substantial reliance upon the Section 7 licensing requirements. Literally millions of miles of gas transmission and distribution lines and billions of dollars invested in public utility facilities and gas consuming equipment are predicated upon a legally secure gas supply. At the heart of this gas supply security system are the licensing requirements of Section 7(b) and 7(c) of the Natural Gas Act. Investors, pipeline companies, local utilities and the public regulatory agencies have come to rely on the knowledge that gas service will not be terminated pursuant to Section 7(b) until *after* the *Commission* finds that the supply is depleted or that abandonment is permitted under the standard of public convenience and necessity.

A judicial doctrine of equitable abandonment introduces a substantial new element of risk into gas utility operations. Each major interstate pipeline has many hundreds of supply sources. Under the decision below, the pipelines would be left with primary responsibility for the security of these supplies. At a time when, as now, there is a "seller's market," pipeline companies may not be adequately equipped to protect against premature abandonments. Depending on its

attitude toward a particular supplier's desire to terminate service, a pipeline could be placed at a competitive disadvantage in relation to another potential purchaser from the same supplier. Nor are gas distributors as a class in a position to oversee the security of their pipeline supplies. Distributors are too remotely located, too unfamiliar with the facts and, speaking practically, not able to second guess their pipeline suppliers' dealings with producer-sellers.

The matter is further exacerbated in view of the incentive for early abandonment created by the multiplicity of other buyers and the range of pricing alternatives under the recently enacted Natural Gas Policy Act of 1978, Pub. L. 95- _____. Under the rate structure established in this new legislation, price ceilings range from 33 cents to \$2.07 per Mcf (thousand cubic feet), depending on the date or "vintage" of the contract or the well commencement date. A given producer may find it in its interest to terminate or abandon service from an older, lower-priced source in the hope that "new service" can be commenced later from the same acreage *at the higher price* allowed for "new gas." Faithful adherence to Section 7(b) requirements is, thus, especially important to security of supply at this time.

The Natural Gas Policy Act of 1978 recognizes the overriding importance of a regulatory system which insures gas supply security. Title VI of this legislation eliminates the Commission's licensing function (previously exercised under Section 7(c) of the Natural Gas Act) with respect to *new* producer sales. At the same time, Title III of this Act imposes a "15-year or life of reserves" requirement on new sales contracts; it also provides certain purchasers with a statutory "right of first refusal" with respect to certain categories of

"deregulated" gas. See Natural Gas Policy Act of 1978, Pub. L. 95- ____, §§ 315 and 601(a)(1)(B).

In short, the decision below establishes a dangerous and unwarranted precedent inimical to the present and future security of interstate gas supplies. The precedential weight of the decision goes far beyond the specific gas reserves at issue and will seriously undermine effective regulation under the Natural Gas Act.

CONCLUSION

The decision of the Tenth Circuit is erroneous. If allowed to stand it will significantly impair effective administration of the Natural Gas Act. For the reasons stated above, the Associated Gas Distributors respectfully requests this Court to reverse the decision below.

Respectfully submitted,

FREDERICK MORING
DANA CONTRATTO

Counsel for *Amicus Curiae*

Of Counsel:

Jones, Day, Reavis & Pogue
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-5800

November 24, 1978

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 1978, three copies of the foregoing Motion For Leave To File Brief *Amicus Curiae* On Behalf Of Associated Gas Distributors And Brief *Amicus Curiae* were mailed, postage prepaid, to counsel for all parties of record.

FREDERICK MORING

1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for *Amicus Curiae*

es

789
24